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In the Supreme Court
of the United States

October Term, 1964

No. [redacted]92

ALBINA ENGINE AND MACHINE WORKS,
an Oregon corporation, and
FIREMAN'S FUND INSURANCE COMPANY,
a California corporation,

Petitioners,

v.

J. J. O'LEARY, Deputy Commissioner,
Bureau of Employees' Compensation,
Department of Labor, and HILDA O'BRIEN,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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No.....

ALBINA ENGINE AND MACHINE WORKS,
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Petitioners,

v.

J. J. O'LEARY, Deputy Commissioner,
Bureau of Employees' Compensation,
Department of Labor, and HILDA O'BRIEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 28, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals (R. 71-79) is reported at 328 F.2d 877 and set forth in the Appendix, *infra* at pages 15-27. The District Court entered no opinion. The Order of respondent J. J. O'Leary, Deputy Commissioner, is set forth in the Appendix, *infra*, at pages 28-31 (R. 8-12).

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1964 (R. 80). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Three questions are presented:

(1) Is a woman, not married to a deceased harborworker, entitled to the compensation benefits extended by Section 9 of the Longshoremen's and Harbor Workers' Compensation Act to a surviving wife if the state compensation act of the locale extends benefits to an unmarried woman?

(2) Are findings of an administrative officer which would otherwise be insufficient or inadequate to support an order sustainable where the reviewing court finds that the necessary facts exist although not so expressly found by the officer?

(3) Was the Court of Appeals correct in finding there was no public policy of Oregon against domiciliaries entering into a common-law marriage on a trip out of the state if the reasons for the strong public policy prohibiting such marriages within the state were equally applicable to such a marriage of its domiciliaries no matter where attempted?

STATUTES

Longshoremen's and Harbor Workers' Compensation Act

Act of March 4, 1927, c. 509, § 2, 44 Stat. 1424, 33 U.S.C. § 902.

"Definitions

"When used in this chapter—

"(16) The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

Act of March 4, 1927, c. 509, § 9, 44 Stat. 1429; 33 U.S.C. § 909.

"Compensation for Death

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

"(b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage . . ."

Act of June 11, 1946, c. 324, § 7, 60 Stat. 241, 5 U.S.C. § 1006.

"Hearings . . . evidence

"(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C. § 1009.

"Judicial Review

"(e) Scope of Review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of

any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Idaho Code

6 Idaho Code, p. 251, § 32-201.

"Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations."

Oregon Revised Statutes

ORS 656.226.

"Wife and children of common-law marriage entitled to compensation. In case an unmarried man

and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation under ORS 656.002 to 656.590 the same as if the man and woman had been legally married."

STATEMENT OF THE CASE

On May 15, 1961, John C. O'Brien died in Portland, Oregon, as a result of injuries received while in the employ of petitioner Albina Engine & Machine Works aboard the SS MONMOUTH in the Willamette River. Respondent Hilda O'Brien filed a claim for survivor's benefits with the respondent Deputy Commissioner, claiming to be the widow of John C. O'Brien. Petitioners disputed the claimant's status as widow and a hearing was held by the Deputy Commissioner.

On August 14, 1962, the Deputy Commissioner entered an order awarding respondent Hilda O'Brien compensation benefits as the surviving wife of John C. O'Brien (Appendix 28-31). Within thirty days (September 11, 1962) petitioners filed a libel in the District Court of Oregon seeking to have the compensation order set aside through injunction proceedings (R. 3-12). The District Court had jurisdiction pursuant to § 21 of the Act. 33 U.S.C. § 921.

On January 21, 1963, after the claimant had intervened, the District Court granted the Deputy Commissioner's motion for summary judgment and dismissed the libel (R. 57-58).

The evidence presented to the Deputy Commissioner at the hearing was generally undisputed. Petitioners have disputed the legal and factual bases for certain critical determinations of the Deputy Commissioner. Shortly stated, petitioners have disputed that a so-called "common-law 'relationship" of Oregon domiciliaries formed while residing in Idaho while one of the parties was already married, could ripen, after dissolution of the former marriage, into a valid common-law marriage on trips to Idaho.[1]

The Court of Appeals also sustained the order of the Deputy Commissioner. The Court held that: a) the claimant's rights to compensation were to be tested by reference to Oregon's compensation law and that as claimant qualified under the Oregon law, benefits under the Federal Act should be awarded; or, b) claimant

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[1] The Court of Appeals says there was "concededly" the conjugal nexus determined necessary by this Court in *Thompson v. Lawson*, 347 U.S. 334 (1954) (Appendix 72). Petitioners never conceded the issue as is shown by the following relevant excerpt from petitioner's brief in the Court of Appeals.

> "However, visitors to Idaho cannot say that they have cohabited together in Idaho. In the *Mauldin* case the court said in finding a common-law marriage that the parties 'cohabited' as husband and wife. 61 Idaho at 20, 97 P.2d 608 at 612. Visitors do not establish a dwelling or residence at the place visited. There is no establishment of a marital habitation. Although considering actions of the parties themselves after a valid marriage, the case of *Thompson* v. *Lawson*, 347 U.S. 334, 74 S. Ct. 555, 98 L. Ed. 733 (1954) seems to express the point most succinctly in requiring a 'conjugal nexus' as a basis for an award of widow's benefits under the provisions of 33 U.S.C.A. § 902 (16). Here the claimant and John C. O'Brien established no 'conjugal nexus' or cohabitation in Idaho or with Idaho while visiting there; there would be no reason for Idaho to apply the policy favoring marriage as expressed in the cases construing the Idaho Code § 32-201." Appellants' Brief pp. 14-15.

and the deceased satisfied the requirements of Idaho marriage law on trips there from Oregon and, as both Idaho and Oregon would permit the Idaho marriage, the parties were married.

REASONS FOR ALLOWING THE WRIT

Question (1) Reference to State Compensation Law

ERRONEOUS APPLICATION OF FEDERAL SUBSTANTIVE LAW

The Court of Appeals engaged in judicial legislation in defining "wife" and "widow" under the Longshoremen's and Harbor Workers' Compensation Act by reference to Oregon's statute giving compensation to an "unmarried" woman in certain circumstances. "Wife" and "widow" by definition include a marriage. If Congress had intended benefits to be awarded unmarried women, it would have so stated.

CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

For almost 50 years since this court's decision in *Seaboard Air Line Ry.* v. *Kenney*, 240 U.S. 489 (1916), the Federal Courts have used the same state domestic relations law in deciding beneficiaries of any federal right. See e.g. *Lavino Shipping Co.* v. *Donovan*, 267 F.2d 59 (3rd Cir., 1959). To now initiate reference to the state statute deemed most relevant is a radical and unwarranted departure from established law.[2]

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[2] Reference to the state compensation law was not urged upon the Court of Appeals by either petitioners or respondents.

THE IMPORTANCE OF THE QUESTION

The mere statement of the principle that beneficiaries will be determined by reference to state compensation law rather than domsetic relations law establishes the importance of the question. Even if the decision of the Court of Appeals could be affirmed on the alternative holding that the parties were lawfully married, this Court should review the important question of the definition of "widow" under the Longshoremen's and Harbor Workers' Compensation Act.

Question (2) Erroneous Review of an Insufficient Administrative Order

ERRONEOUS APPLICATION OF THE ADMINISTRATIVE PROCEDURES ACT

The Court of Appeals failed to review the record pursuant to the standards of the Administrative Procedure Act (5 U.S.C. § 1009) and therefore failed to reverse the District Court's order sustaining the insufficient findings of the Deputy Commissioner.

The Court of Appeals affirmed findings of the Deputy Commissioner although apparently its only basis for doing so was that petitioners were being frivolous in suggesting the absence of necessary factual findings. The Court said: ". . . and it borders on the frivolous

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but petitioners question whether claimant would qualify under the state statute in any event. The statute extends benefits only to a woman who had children while unmarried; the Court of Appeals was incorrect in stating that Hilda and John had a child in Oregon while both were unmarried because the findings show that the child was born in 1942 before John's first wife divorced him in 1943.

to suggest that the conduct of John and Hilda in Idaho, even if confined to the period after 1943, did not show consent to marriage and mutual assumption of marital duties, thus satisfying the requirements of Idaho Code § 32-201 (1947)." (R. 79).

The assumptions inherent in the Court's statement exemplify the Court's error in reviewing the case and the lack of factual support in the findings of the Deputy Commissioner. 5 U.S.C. § 1006. The Deputy made no findings of fact which would fulfill the requirements of marriage in Idaho either as regards consent or assumption of marital rights, duties and obligations. See Idaho Code 32-201.

A noted author has ably stated the reason for requiring supporting findings of fact. He says: "The obvious disadvantage of assuming that a general finding includes all specific findings necessary to support it is that the assumption may often be contrary to the fact; the various practical reasons for requiring findings are subverted by the assumption." Davis, *Administrative Law Treatise*, § 16.07, Vol. 2, p. 456 (1958).

CONFLICT IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT

In this case for all that is known, the Deputy Commissioner may have found, if called on, that there was no mutual consent of marriage. The Deputy Commissioner found the claimant and decedent married but he only supported this by saying that annual visits to Idaho created or confirmed a marital relationship. These findings do not meet the standards of this Court as de-

fined in *Florida* v. *U. S.*, 282 U.S. 194, 75 L. Ed. 291 (1931), when compared with the appropriate Idaho statute, 32-201 Idaho Code.

IMPORTANCE OF THE QUESTION

Annual visits were apparently not quite sufficient for the Court of Appeals because it found that the claimant and decedent were more than visitors and that they visited "as husband and wife" in Idaho (R. 78). Aside from the fact that the Court of Appeals is making its own findings, the Court lost sight of the fact that its function was to compare the findings of fact of the Deputy Commissioner with an appropriate legal standard (5 U.S.C. § 1009) and determine if the findings were supported by evidence (5 U.S.C. § 1006). The Court failed to do this and its opinion, if left standing, will seriously impugn and erode the decisions of this court in cases such as *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 95 L. Ed. 483 (1951), defining the duties of reviewing courts.

Question (3) Conflict with Important Public Policy of Oregon

The Court of Appeals held Oregon's public policy would not prohibit the common-law marriage of claimant and decedent in Idaho. The Court adopted its holding on the novel basis that the State of Oregon has two public policies: the first policy prohibits common-law marriages within the state and the second policy permits common-law marriages without the state. It was necessary for the Court to adopt such a holding because

no stronger statement of public policy against common-law marriages can be found than the policy expressed in *Huard* v. *McTeigh*, 113 Or. 279, 295, 6, 232 Pac. 658, 663 (1925). The Oregon Court stated: "In our opinion the doctrine of common-law marriages is contrary to public policy and public morals. It places a premium upon illicit cohabitation and offers encouragement to the harlot and the adventuress. We do not sanction loose marriages or easy divorces . . . We are convinced that the conclusions herein reached are in keeping with the public policy of this state . . ." In ruling Oregon's marriage statutes mandatory, the Oregon Supreme Court rejected the holding of this Court in *Travers* v. *Reinhardt*, 205 U.S. 423, 51 L. Ed. 865 (1907) that marriage laws were only directory. 113 Or. at 291, 232 Pac. at 662. Should there be any doubt about the public policy of the State of Oregon, one has only to measure the aftermath of the decision in *Huard* v. *McTeigh*, supra. The legislature immediately passed an act legitimatizing the children of meretricious relationships by declaring the parents, under certain conditions, married. Oregon Laws 1925, Chapter 269. However, even this concession to protect the innocent was repealed after the only case interpreting the statute reached the Oregon Supreme Court. The case of *Wadsworth* v. *Brigham*, 125 Or. 428, 259 Pac. 299, 266 Pac. 875 (1928) was followed by repeal of the statute of 1925. Oregon Laws 1929, Chapter 149.[3]

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[3] It would seem that the Court of Appeals has found holdings in certain Oregon cases not actually present there. It is submitted that the Court of Appeals erroneously cited *Leefield* v. *Leefield*, 85 Or. 287, 166 Pac. 953 (1917) and *Sturgis* v. *Sturgis*, 51 Or. 10, 93 Pac. 696 (1908).

The policy reasons expressed by the Oregon Supreme Court against common-law marriages are equally valid whether the marriage is attempted in or out of the state.

The Court of Appeals thus decided an important question of state marriage law in direct conflict with the applicable state law.

CONCLUSION

The position of petitioners is so strong that the only explanation of the results below is sympathy for this woman. This case, unless reviewed and reversed by this Court, will prove the accuracy of the old legal saw that "hard facts make bad law." The results below will have an impact far beyond the result in this case and effect material and substantial changes and departures from established Federal and State law, the merits of which should be considered by this Court.

Respectfully submitted,

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Attorneys for Petitioners.

These cases held that for procedural reasons no attack on the marriages in issue was possible.

In *Ollschlager's Estate* v. *Widmer*, 55 Or. 145, 105 Pac. 717 (1909), the Oregon Court held that ceremonial defects would be overlooked, not that a ceremony was unnecessary as stated by the Court of Appeals.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBINA ENGINE AND MACHINE WORKS, an Oregon corporation, and FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Appellants,

v.

J. J. O'LEARY, Deputy Commissioner, Bureau of Employees' Compensation, Department of Labor, and HILDA O'BRIEN,

Appellees.

No. 18,545

[Feb. 28, 1964]

Appeal from the United States District Court for the District of Oregon

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Before: MADDEN, Judge of the Court of Claims, and HAMLIN and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

The sole question on this appeal is whether the District Court erred in sustaining the determination of the Deputy Commissioner that Hilda O'Brien was the "surviving wife" of John C. O'Brien, within the meaning of Section 909 of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424 (1927), 33 U.S.C.A. §§ 901-50.

The meaning of the statute is, of course, a question of federal law. However, since the statute does not define the term "surviving wife."[1] and since marital status

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[1] The term "widow" is defined in § 902(16) of the Act as "the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or

is ordinarily determined by local law, it has been assumed that Congress intended the term to have the the meaning which it is given by local law.[2] The parties agree that the law of two states may be pertinent: Oregon, in which injury and death occurred, in which Hilda and John were domiciled at the time of these events, and in which the Deputy Commissioner and the District Court sat; and Idaho, in which Hilda contends she and John contracted a non-ceremonial marriage. We think Hilda occupied the required status under the law of either state, and since there was concededly "a conjugal nexus between the claimant and the decedent subsisting at the time of the latter's death . . . ," recognition of Hilda's claim is in accordance with the purpose of the federal legislation. *Thompson* v. *Lawson*, 347 U.S. 334, 336-37 (1954).

I

Under Oregon law Hilda was the "surviving wife" or "widow" of John for the purposes of receiving death benefits under the Longshoremen's and Harbor Workers' Act upon either of two independent grounds.

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by reason of his desertion at such time." To qualify as "surviving wife" under § 909, the claimant must be a "widow" under § 902(16). Lavino Shipping Co. v. Donovan, 267 F.2d 59, 60 (3d Cir. 1959), and cases cited.

[2] Gibson v. Hughes, 192 F. Supp. 564, 566 (S.D.N.Y. 1961); Keyway Stevedoring Co. v. Clark, 43 F.2d 983-84 (D. Md. 1930). See also Bolin v. Marshall, 76 F.2d 668 (9th Cir. 1935); Green v. Crowell, 69 F.2d 762 (5th Cir. 1934); Beebe v. Moormack Gulf Lines, Inc., 59 F.2d 319 (5th Cir. 1932). Cf. Ellis v. Henderson, 204 F.2d 173, 175-76 (5th Cir. 1953). The rule is applied under analogous statutes. De Sylva v. Ballentine, 351 U.S. 570, 580 (1956); Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 493-94 (1916); Metropolitan Life Ins. Co. v. Chase, 294 F.2d 500 (3d Cir. 1961); Tatum v. Tatum, 241 F.2d 401, 405 (9th Cir. 1957).

First. Oregon Revised Statutes (O.R.S.) §§ 656.002-.590, .990 (1953) (the comparable state compensation act) grants various benefits to the "wife" or "widow" of a workman, and provides in O.R.S. § 656.226 (1953) as follows:

> *Wife and children of common-law marriage entitled to compensation.* In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife over one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation . . . the same as if the man and woman had been legally married.

The evidence is undisputed that Hilda and John (then unmarried, unless the nonceremonial Idaho union is given effect) lived together in Oregon as husband and wife for many years prior to John's injury, and that a child born in Oregon as a result of that relation was living.

Since Hilda thus would be the "wife" or "widow" of John for the purpose of identifying the recipient of death benefits under the Oregon Workmen's Compensation Act, she should also be a "wife" or "widow" for the same purpose under the Longshoremen's and Harbor Workers' Act when these terms are defined by reference to the law of Oregon.

It should make no difference if (as has been suggested) the reference in the title to O.R.S. § 656.226 (1953) to a "common-law marriage" is inaccurate, and the statute "does not relate to marriage at all." Million,

Consanguinity and Affinity in Oregon, 23 Ore.L.Rev. 69, 90 (1944). Neither the Oregon Workmen's Compensation Act nor the Longshoremen's and Harbor Workers' Act relate to or affect the marriage relationship as such. And the laws of the state regarding marriage are only tangentially relevant as they may bear upon the existence of the status of "wife" or "widow" for the purposes of identifying recipients of benefits under these remedial statutes.

The application of ordinary state domestic relations law developed in other contexts to the solution of problems under workmen's compensation statutes produces results which at best have only a fortuitous relation to the remedial purposes of the compensation acts, and often are in direct conflict with them. When the state law does provide a definition of marital status deliberately shaped to compensation act purposes alone, there is no reason why that definition should not be applied under the federal statute in preference to one drawn from general domestic relations law. Indeed, this would seem to be compelled by the relationale of the rule requiring that terms relating to financial relationships be defined by reference to state law. The rule was initially adopted on the ground that to hold otherwise would be to create a set of federal rules in discord with those of the states "on subjects of the most intimate domestic character." *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 494 (1916). This reasoning requires adoption of the same definitions of marital status the state itself would apply in essentially the same situation.

Second. Even if O.R.S. § 656.226 (1953) did not control, Hilda would qualify as John's "surviving wife" or "widow" under the general domestic relations law of Oregon, since Oregon would recognize the nonceremonial marriage of John and Hilda if validly contracted in Idaho.

The courts of Oregon hold that the statutes of that state requiring the formal solemnization of marriage are mandatory, and hence that the marriage relationship is not created in Oregon unless the statutory formalities are complied with.[3] However, it is equally well settled that under Oregon law "a relationship recognized in another state where it was consummated will be recognized in Oregon even though such a relationship would not be a marriage if the same facts had been relied upon to create a marriage in Oregon." *Boykin v. State Industrial Acc. Comm'n,* 224 Ore. 76, 81-82, 355 P.2d 724, 727 (1960).[4] This, of course, is but an application of the general rule that "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." Restatement, Conflict of Laws § 121 (1934).[5]

Appellants nonetheless resist reference to the law of

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[3] Wadsworth v. Brigham, 125 Ore. 428, 259 Pac. 299 (1927), aff'd 266 Pac. 875 (1928); Huard v. McTeigh, 113 Ore. 279, 232 Pac. 658 (1925), Note, 4 Ore.L.Rev. 308 (1925). See also Bolin v. Marshall, 76 F.2d 668 (9th Cir. 1935); Boykin v. State Industrial Acc. Comm'n, 224 Ore. 76, 355 P.2d 724 (1960). Compare Travers v. Reinhardt, 205 U.S. 423, 440 (1907).

[4] See also Ollschlager's Estate v. Widmer, 55 Ore. 145, 105 Pac. 717 (1909); Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908).

[5] See also Loughran v. Loughran, 292 U.S. 216, 223 n.3 (1934); Madden on Persons and Domestic Relations 75 (1931).

Idaho on the ground that Oregon will not follow the general rule where its residents enter into a nonceremonial marriage during a visit to another state. We think this is not an accurate statement of Oregon law, and are satisfied that in the circumstances of this case the Oregon Supreme Court would recognize the nonceremonial marriage of Hilda and John if valid under the law of Idaho.

It is true that the state of domicile may decline to recognize a marriage strongly offensive to its policy, even though valid under the law of the state where the marriage was contracted.[6] But in Oregon, as in most other states, this exception to the general rule "is invoked only in a few situations." Restatement (Second), Conflict of Laws, Tentative Draft No. 4, § 132, comment b (1957).[7] Thus, in *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696 (1908), the Supreme Court of Oregon held that the marriage of a domiciliary ward was valid though the ward contracted the marriage in another state to avoid the disability imposed by the laws of Oregon. The court said, "a marriage valid where solemnized is valid everywhere, not only in other states generally, but in the state of the domicile of the parties, even when they have left their own state to marry elsewhere for the purpose of avoiding the laws of the state of their domicile." The court recognized only two exceptions to this rule, "viz., marriage which are deemed contrary to the law of nature as generally recognized

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[6] Restatement, Conflict of Laws § 132 (1934).

[7] See also Comment, 11 Okla. L. Rev. 305 (1958).

in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication . . . ." 51 Ore. at 16, 93 Pac. at 698. The Oregon Supreme Court reaffirmed the rule of *Sturgis* in *Leefield v. Leefield*, 85 Ore. 287, 166 Pac. 953 (1917), sustaining a marriage between first cousins prohibited by Oregon statute when contracted by Oregon domiciliaries in another state.

The only instances called to our attention in which the Oregon Supreme Court has declined to recognize marriages between its domiciliaries validly contracted in other states involved marriages consummated within six months of an Oregon divorce in the face of an Oregon statute providing that "neither party shall be capable of contracting marriage" during that period. The latter statute is read by the Oregon Supreme Court as providing "that persons under the prohibition of the statute are incapable of entering into contract of marriage, and, therefore, being unable to contract the marriage, wherever performed, it is void abinitio." *Wright v. Kroeger*, 219 Ore. 102, 105, 345 P.2d 809, 811 (1959).[8] Such marriages thus fall within the second of the two exceptions stated in *Sturgis*.

Since a nonceremonial marriage does not fall within either of the *Sturgis* exceptions, it may be anticipated that the Oregon Supreme Court would follow the gen-

[8] See also In re Ott's Estate, 193 Ore. 262, 238 P.2d (1951), and cases cited.

eral rule[9] that such marriages are valid everywhere, including the domicile of the parties, if valid in the state where contracted.

Appellant relies upon language of the Oregon Supreme Court in *Huard v. McTeigh*, 113 Ore. 279, 295-96, 232 Pac. 658, 663 (1925), characterizing "common-law" marriages as contrary to the public policy of the state. But in *Boykin v. State Industrial Acc. Comm'n*, 224 Ore. 76, 355 P.2d 724 (1960), the court sustained a claim for widow's benefits under the Oregon Workmen's Compensation Act based upon a nonceremonial marriage contracted in Idaho, reversing a decision of the State Industrial Accident Commission which had denied the validity of the marriage. The Oregon Supreme Court did not suggest that state policy created any obstacle to this result. It is true that in *Boykin* the parties were not domiciled in Oregon at the time of the Idaho marriage, but there is nothing in the opinion to indicate that the result would have been different had they been Oregon domiciliaries; and in *Ollschlager's Estate v. Widmer*, 55 Ore. 145, 154-56, 105 Pac. 717, 720 (1909), the Oregon Supreme Court sustained a marriage of a domiciliary contracted in another state, although assuming that ceremonial requirements had not been met.

Finally, even if O.R.S. § 656.226 is not given the determinative effect we have suggested, it at least establishes beyond question that the public policy of Oregon

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[9] Restatement, Conflict of Laws § 123 (1934); Madden on Persons and Domestic Relations 76-77 (1931).

does not preclude recognition of nonceremonial marriages for the purpose of identifying recipients of death benefits under legislation such as the Longshoremen's and Harbor Workers' Compensation Act, and that the public policy of Oregon would affirmatively favor Hilda's claim in the circumstances of this case.

Since it appears that Oregon would recognize a nonceremonial marriage contracted in Idaho by Hilda and John, if valid under Idaho law, we turn to the latter inquiry.

II

Idaho recognizes nonceremonial marriages.[10] Under the pertinent Idaho statutes, there are only two requirements for a valid marriage: (1) "consent," and (2) "mutual assumption of marital rights, duties or obligations." Idaho Code § 32-201 (1947.)[11] And both "may be manifested in any form." Idaho Code § 32-203 (1947).[12]

Hilda and John lived toether as husband and wife continuously from 1938 until John's death in 1961, and

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[10] The leading Idaho decision is Huff v. Huff, 20 Idaho 450, 118 Pac. 1080 (1911). The Idaho authorities are reviewed in Boykin v. State Industrial Acc. Comm'n, 224 Ore. 76, 355 P.2d 724 (1960).

[11] Idaho Code § 32-201 (1947) provides:

> Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations.

[12] Idaho Code § 32-203 (1947) provides:

> Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

were accepted as such by their families and the communities in which they lived. Their relationship began in Idaho, and two of their three children were born there. They moved to Oregon in 1942, where they lived until John's death. Each year from 1942 until John's accident in 1956 they returned to Idaho with their children, and spent a week or two visiting their parents.

John had married one Goldie J. Harper in 1928. Although he separated from Goldie in 1937, before his union with Hilda, the marriage was not formally dissolved until 1943. The existence of this undissolved prior marriage prevented a valid marriage between Hilda and John at the inception of their relationship. However, under Section 32-201 of the Idaho Code, "consent is a continuing thing" (*In re Foster*, 77 Idaho 26, 32, 287 P.2d 282, 285 (1955)),[13] and "although the contract and consent marriage . . . was *absolutely void at the time*, the more reasonable rule seems to be that a continuance of the marital relation and assumption of its duties, after the impediment ceased . . . amounted to a consensual marriage, under the statute, and could not be assailed or avoid." *Morrison v. Sunshine Mining Co.*, 64 Idaho 6, 12, 127 P.2d 766, 769 (1942).[14]

Accordingly, the Deputy Commissioner found that Hilda and John "entered into a common-law relation-

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[13] See also Boykin v. State Industrial Acc. Comm'n, 224 Ore. 76, 85, 355 P.2d 724, 728 (1960).

[14] Thomey v. Thomey, 67 Idaho 393, 397-98, 181 P.2d 777, 779 (1947); Nicholas v. Idaho Power Co., 63 Idaho 675, 680-81, 125 P.2d 321, 323-24 (1942); Huff v. Huff, 20 Idaho 450, 460-61, 119 Pac. 1080, 1083 (1911).

ship" in Idaho in 1938, and "that the annual visits of the deceased and the claimant to Idaho after the dissolution of the marriage of the deceased on April 10, 1943, were sufficient to create or confirm the marital relationship which existed between the deceased and the claimant from 1938 until his death in 1961 . . . ."

In attacking this conclusion, appellants appear to argue (1) that Hilda and John could not contract a nonceremonial marriage during visits to Idaho while domiciled in Oregon, and (2) that even assuming that Idaho law would permit such a marriage, it would not do so without proof of an explicit agreement in Idaho during the visits.

(1) There is no apparent reason why Idaho should object to a marriage of nondomiciliaries visiting in the state, so long as they comply with Idaho law, and Idaho Code § 32-201 (1947) draws no distinction between residents and nonresidents.[15] Moreover, John and Hilda's connection with Idaho was not that of mere visitors. As we have noted, their relationship began there; they lived in Idaho as man and wife from 1938 to 1942; two of their three children were born in Idaho; and both John and Hilda had parents in Idaho whom they visited annually, as husband and wife, accompanied by their children.

The Idaho Supreme Court has repeatedly affirmed that "the rule adopted in this jurisdiction is that . . . every intendment of the law leans to matrimony."

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[15] Cf. Taintor, Marriage in the Conflict of Laws, 9 Vand.L.Rev. 607, 620-21 (1956).

(*Maudlin v. Sunshine Mining Co.*, 61 Idaho 9, 17, 97 P.2d 608, 611 (1939)),[16] and it borders on the frivolous to suggest that the conduct of John and Hilda in Idaho, even if confined to the period after 1943, did not show consent to marriage and mutual assumption of marital duties, thus satisfying the requirements of Idaho Code § 32-201 (1947).

(2) It is true that some jurisdictions appear to follow a rule that to establish a valid marriage after the removal of a legal impediment there must be some evidence of a new marriage agreement in addition to mere continuation of the prior relationship.[17] But the Supreme Court of Idaho has expressly rejected this requirement in cases involving Idaho domiciliaries, and nothing in those decisions or in the Idaho statutes suggests that a different rule will be applied to nondomiciliaries. All that Idaho law demands is a continuation, following removal of the impediment, of conduct sufficient to constitute a manifestation "in any form" of the "consent" and "mutual assumption of marital rights, duties or obligations," required by Idaho Code § 32-201 (1947).[18]

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[16] See also Thomey v. Thomey, 67 Idaho 393, 397, 181 P.2d 777, 779 (1947); Nicholas v. Idaho Power Co., 63 Idaho 675, 681-82, 125 P.2d 321, 324, and cases cited.

[17] See, e.g., Tatum v. Tatum, 241 F.2d 401, 409-10 (9th Cir. 1957); In re Binger's Estate, 158 Neb. 444, 63 N.W.2d 784, 788-89 (1954); Madden on Persons and Domestic Relations 73-75 (1931).

[18] See notes 11, 12, supra; Thomey v. Thomey, 67 Idaho 393, 396-98, 181 P.2d 777, 778-79 (1947). See also Warner v. Warner, 76 Idaho 399, 405, 283 P.2d 931, 934 (1955); Morrison v. Sunshine Mining Co., 64 Idaho 6, 12, 127 P.2d 766, 769 (1942); Nicholas v. Idaho Power Co., 63 Idaho 675, 680, 125 P.2d 321, 323 (1942); Huff v. Huff, 20 Idaho 450, 460-63, 118 Pac. 1080, 1083-84 (1911).

We note that the record contains a letter opinion addressed to the Deputy Commissioner by the Attorney General of Idaho stating that under Idaho law "the appearance of the parties in Idaho as husband and wife after the impediment to the marriage was removed would be sufficient to create the marital relationship or confirm it."

Affirmed.

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act	)	
HILDA V. O'BRIEN	)	
Claimant,	)	COMPENSATION ORDER AWARD OF DEATH BENEFITS CASE NO. 73-2119
(JOHN C. O'BIEN, DECEASED)	)	
vs.	)	
ALBINA ENGINE & MACHINE WORKS	)	
Employer,	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Insurance Carrier.	)	

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 17th day of June, 1957, the deceased above named was in the employ of the employer above named at Portland, Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for

compensation under said Act was insured by Fireman's Fund Insurance Company; that on said date the deceased herein while performing service as a boilermaker for the employer and engaged in work incidental to the repair of the vessel, SS MONMOUTH, which was afloat at Swan Island Dock, sustained personal injury resulting in his disability when while working in a tank aboard said vessel the scaffolding on which he was standing gave way causing him to fall to the bottom of the tank in consequence of which he suffered multiple fractures and a severe brain injury; that as a result of the injury sustained the deceased was wholly disabled from June 18, 1957 to May 15, 1961, inclusive, and he was entitled to 204 weeks' compensation at $54.00 per week in the amount of $11,016.00 for such temporary total disability; that the employer and carrier paid to the deceased compensation in the amount of $11,016.00; that the death of the deceased employee occurred on May 15, 1961, and his death was causally related to the injury he sustained on June 17, 1957, while in the employ of the employer above named; that written notice of death was given within 30 days; that it is admitted that at the time of his injury the average weekly wage of the deceased employee exceeded $81.00; that on July 2, 1929, the deceased was married in the State of Idaho and continued to live with his wife in Idaho until March 11, 1937, when they separated and his wife moved to the State of Oregon; that the deceased continued to reside in Idaho, and during November of 1938 the claimant above named and the deceased entered into a common-law relationship in Middleton, Idaho;

that they continued to live in the State of Idaho until September 15, 1942, when they moved to the State of Oregon; that while they were residents of Idaho, two children were born to them and another child was born to them in the State of Oregon during the year 1942; that on April 10, 1943, the marriage of the deceased was dissolved by divorce proceedings in the State of Oregon instituted by the wife of the deceased; that during the years 1943 to 1956 the claimant and the deceased made annual visits to relatives in the State of Idaho and would remain in Idaho for a week, or sometimes two weeks, during each visit; that during the years they lived together the deceased and the claimant held themselves out to be, and were known as, husband and wife; that the annual visits of the deceased and the claimant to Idaho after the dissolution of the marriage of the deceased on April 10, 1943, were sufficient to create or confirm the marital relationship which existed between the deceased and the claimant from 1938 until his death in 1961; that the claimant, Hilda V. O'Brien, who was born November 1, 1915, is the surviving wife of the deceased and as such is entitled to death benefits for her support at the rate of $28.35 per week; that the accrued death benefits to which the claimant is entitled from May 16, 1961 to August 13, 1962, inclusive, a period of 65 weeks at $28.35 per week amount to $1,842.75, no part of which has been paid by the employer or insurance carrier; that the employer and carrier are liable for and have paid reasonable funeral expenses of the deceased in the amount of $400.00.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Albina Engine & Machine Works, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to Hilda V. O'Brien, surviving wife of the deceased death benefits for her support as follows: 65 weeks at $28.35 per week from May 16, 1961 to August 13, 1962, inclusive, in the amount of $1,842.75, which amount the employer and carrier are directed to pay forthwith in one sum (less attorneys' fees hereinafter provided for) and shall thereafter continue payments of death benefits to the claimant, Hilda V. O'Brien, for her support in bi-weekly instalments at the rate of $28.35 per week, subject to the limitations of the Act or until otherwise ordered. A fee in the amount of $200.00 is hereby approved in favor of Pozzi, Levin & Wilson, Attorneys at Law, Suite 806, Cascade Building, Portland 4, Oregon, for services rendered the claimant in connection with the presentation of her claim for death benefits, same to constitute a lien upon and be payable from this award.

Given under my hand at Seattle, Washington this 14th day of August, 1962

/s/ J. J. O'LEARY

Deputy Commissioner
Fourteenth Compensation District